In the Supreme Court of the United States

OCTOBER TERM, 1924

L. RICHARDSON & CO., INC., APPELLANT
v.
THE UNITED STATES
No. 142

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

The plaintiff (appellant) brought suit in the Court of Claims to recover $270,746.00 as damages for alleged breach of contract by the War Department in refusing to exercise options to purchase, receive, and pay for 7,168 bales and 1,518 bags of South African wool, classed as "Finer than 56s" imported under Government supervision by claimant between April 1 and July 12, 1918.

The Court of Claims sustained the demurrer of the United States to the amended petition, upon the ground that it did not allege a cause of action, and entered a judgment dismissing the petition.

STATEMENT

The amended petition alleges in substance as follows:

Between December 15, 1917, and the spring of 1919 the War Industries Board, the War Trade

Board, and the Wool Administrator were agents of the War Department or of the President of the United States, acting on behalf of the War Department.

On December 15, 1917, the War Trade Board issued a regulation to the effect that applicants for import licenses for wool would be required before the license is granted to sign an agreement not to sell the wool to any person other than a manufacturer, and to grant to the United States options to purchase the wool imported. (Exhibit A, Rec. 4, 5.) This Regulation was revised on January 8, 1918. (Exhibit B, Rec. 5, 6, 7.)

On March 11, 1918, the Acting Quartermaster General issued a regulation under which the Government exercised options theretofore reserved on wool grading "44s to 56s," thus making purchases thereof, and extending the options on other wool. (Exhibit C, Rec. 7.)

On April 1, 1918, the Acting Quartermaster General issued another bulletin or regulation announcing that the Government would continue to purchase all imported wool Standard Fours, and grading "44s to 56s," but stating that it would not exercise options with respect to wool "Finer than 56s" imported prior to April 1, 1918, reserving the right, however, to exercise options on the latter class of wool bought on or after April 1, 1918. (Exhibit D, Rec. 7, 8.)

On May 17, 1918, the Acting Quartermaster General issued a further bulletin or regulation exer-

cising options reserved under the regulation of April 1, 1918, referred to as Exhibit D, on all wool imported which rated above "56s." (Rec. 2, 3. Exhibit E, p. 8.)

On July 12, 1918, the War Trade Board issued another regulation or bulletin, taking over in the name of the Quartermaster General all licenses issued prior to July 28, 1918, for the importation of wool, and requiring that all licenses thereafter issued would be in the name of that officer. (Rec. 3, Exhibit F, pp, 8, 9.)

Subsequent to April 1, and prior to July 12, 1918, the claimant purchased under licenses the wool involved in this suit.

The original licenses issued to the claimant by the Government for the importation of this wool were canceled under the regulations of the War Trade Board dated July 12, 1918, just referred to, and new licenses were issued to the claimant in the manner above described.

On July 18, 1918, when the claimant was seeking to charter a boat from the Shipping Board to transport part of the wool, he was required to give a guaranty in writing that nothing would be carried in the vessel except wool destined for the Quartermaster General, and some ballast. (Rec. 3.)

On July 24, 1918, the Quartermaster General issued a further order directing that thereafter the Government would buy the wool direct in South Africa, stating that in its former order he had agreed to instruct the Wool Administrator to exer-

cise the Import License Options on all wools grading " 44s to 56s," and that when notice was given by the Acting Quartermaster General of his wish to discontinue the purchase of such wools under the Import License Option, he would exercise the Import License Option on all wools bought prior to the date of such notice. (Rec. 3, Exhibit G–1, p. 11.)

The claimant duly executed the proper applications, together with options and agreements to sell this wool to the Government as required in the regulations of January 8, 1918 (Exhibit B), and tendered delivery thereof to the United States in accordance with the regulations.

It is further alleged that under these options the United States agree to buy and pay claimant $1,434,054.60 for the 7,168 bales and 1,518 bags of wool, on delivery.

On December 23, 1918, the Assistant Wool Administrator wrote the claimant that he had notified the latter's agent that he would take the wool described in the letter, amounting to 17,200 bales, which is alleged to include the 7,168 bales and 1,518 bags involved in this suit. He did accept and pay for all except the 7,168 bales and 1,518 bags, which he declined to take, and the claimant was thereby compelled to dispose of his wool to other parties, and after due and proper diligence obtained the best price therefor, which, after deducting the cost of resale, amounted to $1,163,303.60, thus causing the claimant to lose $270,743, the difference between

the price named in the options and the resale price.

The specific questions involved are: First, Whether the United States, by the foregoing communications, bulletins, or regulations, exercised the options reserved, to purchase the wool involved, or, Secondly, whether, independently thereof, the regulations constitute an implied contract with the claimant to purchase the wool.

ARGUMENT

I.

(a) The United States did not exercise the options to purchase the wool in issue

In order to conserve the resources and facilities of the country which the exigencies of the World War demanded, and to prevent trading with the enemy, there were created on July 28, 1917, by the Council of National Defense, and with the approval of the President, the War Industries Board, and by Proclamation of October 12, 1917, of President Wilson, the War Trade Board. A further proclamation issued on November 28, 1917, in accordance with the Acts of October 6, 1917 (40 Stat. 422, and Section 5, Lever Act of August 10, 1917, 40 Stat. 276), declared that the public safety required that certain articles therein enumerated, including wool, should not thereafter be imported into the United States, except under license granted by the War Trade Board, in pursuance with its regulations or orders.

Pursuant to the foregoing proclamations, the agencies named determined upon a plan for the control of imported wool, which had a twofold purpose: First, to prevent any trading in this commodity with the enemy. This was accomplished through the medium of an Import License System. Secondly, to assure an adequate supply of wool to meet the demands of the Government during the war. This was effected by requiring the importer, before a license would be issued, to grant to the United States certain options to purchase the wool when imported.

Consonant therewith the War Trade Board on December 15, 1917, announced that any applicant for an import license for wool purchased after that date outside of the United States would have to comply with the following regulations:

> (1) No imported wool should be sold to any person other than a manufacturer without the consent of the War Industries Board.
>
> (2) The United States Government should hold an option on all wool imported for ten days after the Custom House Entry, and thereafter on any unsold part until the whole amount had been disposed of. (Exhibit A, Rec. 4, 5.)

The office of Wool Administrator, Quartermaster Corps, was created in March, 1918, and this officer took care of receiving all wool purchased by the United States. From March 1, 1918, until the termination of the war, the Quar-

termaster Corps of the United States Army was charged with the duty of exercising on behalf of the United States the options reserved under the foregoing regulations. (Report of War Industries Board dated March 3, 1921, Bernard M. Baruch, Chairman, to President Wilson, pp. 231-236.)

The claimant alleges that he duly complied with the regulations by executing the options and agreements to sell the wool to the Government, and that the latter, in refusing to accept delivery thereof and to pay for it, "as it had agreed to do," resulted in a loss to claimant for which the United States is liable. It can not be said that the Government in taking these options thereby agreed to purchase the wool, in the sense that a refusal to exercise the option constituted a breach of the contract. The option only granted the privilege to purchase, *at the election of the United States* (*Western Union Tel. Co.* v. *Brown*, 253 U. S. 101, 110, 111), being more in the nature of an unaccepted offer to sell, transferring no title or right *in rem*, but creating a right *in personam*, which right is to accept or *reject* the offer within the time limited. *Standiford* v. *Thompson*, 135 Fed. 991, 996.

It was not only the right of the Government to decline to exercise the options without liability, but it was also the plain duty of its officers to refuse to accept any wool not needed after the armis-

tice had been signed and the war was practically at an end.

(b) The facts admitted by the demurrer do not establish a contract on the part of the United States to purchase the wool

It is further alleged that the original import licenses under which the wool involved was imported were canceled, and a new license, issued in the name of the Quartermaster General, was delivered to the claimant, together with the bill of lading made out to the Textile Alliance, Inc., and assigned to the Quartermaster General; that a written guarantee was taken from the claimant that nothing but the wool called for in the license would be carried in the ship chartered by the Government to the claimant; and that there was a delivery of part of the consignment, for which the United States has paid.

It is claimed that these are acts which of themselves constitute in law an agreement to buy, thereby making the Government liable for the purchase price of the remainder of the wool.

There is no merit in this contention. Conditions which developed at the time the new licenses were issued necessitated a change in the system of handling the importation of wool. In explanation thereof Mr. Bernard M. Baruch, in his report of the War Industries Board to the President, at page 234, states:

> There remained one more problem in connection with the purchase of wool. South

> America and South Africa were open markets where the Allies and private merchants were competing with each other in making purchases. For the purpose of eliminating competition between American traders and the American Government, an import regulation was made, effective July 28, 1918, restricting licenses to the Quartermaster General only.

There was another condition which prompted the change. The Government determined that by the plan theretofore followed it did not have sufficient control over the importations to insure the utilization of the wool in the best interests of the country. This resulted in the issuance of a regulation, made Exhibit F to the claimant's amended petition (Rec. 8, 9), providing that no licenses for the importation of wool from South Africa would be issued except to the Quartermaster General.

The power of the Government to revise its plans in order to obtain a more efficient and complete control of this commodity can not be denied, and in so doing it incurred no liability therefor to the claimant, for the power being expressly granted by Congress to regulate the importation and sale of wool, it necessarily included the power to devise and put into operation the machinery for the proper adminstration of those laws.

It is further contended that the cancellation of claimant's original import license, and the issuing of the new one, in the manner outlined above, to-

gether with the acceptance in part of the consignment, constitute an exercise of the option to purchase all of the wool.

This is only another way of presenting the same point just considered.

The taking of the license in the name of the Government agent did not constitute an exercise of the option. The claimant understood that procedure to be part of the prescribed plan for the control of the importation. If this were not so, there would have been no apparent need for the granting of the option by the claimant. As already stated, the regulation, Exhibit F, clearly explains the reason which prompted a revision of the plan for the importation of wool from South Africa. The Government certainly did not intend thereby to purchase all the wool, for the Wool Administrator stated in his letter of December 23, 1918, to claimant:

> 1. We have notified Mr. Carl Bacon, of Winslow & Co., to-day that we will take of your importations of Cape Wools the three thousand bales of scoured Cape for which you already have an Import License, and the scoured product of the eleven thousand bales of wool bought in the grease to be scoured at the Cape, figured on a basis of 35 per cent shrink, a 225-lb. scoured bale or approximately 6,000 bales; also 2,000 bales and 1,200 bales in the grease, or their equivalent, figured on the same basis if they come forward as scoured wool. *In other*

words, we will not accept as many bales of scoured wool as you originally had Import Licenses to cover in the grease. (Rec. 12.) [Italics supplied.]

The facts set forth in the petition do not make out any agreement on the part of the United States to purchase the claimant's wool; they do not establish that anyone authorized to represent the United States agreed with claimant to purchase the same, nor that there was any taking or appropriation of the claimant's property. In other words, the averments do not show a contract, express or implied, whereby the United States agreed to pay for this wool or for any other wool, except that which might have been taken under definite agreements and used by it. Moreover, it is not alleged that the Government prevented the claimant from disposing of this wool to others, which he had the right to do.

II

The claim is not one founded upon a "regulation" of an executive department within the meaning of section 145 of the Judicial Code

The demurrer does not admit the conclusions of law nor other matter not well pleaded. Neither does it admit the averments of conclusions which are contrary to the wool bulletins or regulations upon which the alleged contract of sale to the United States is claimed to rest.

On *December 12, 1918,* the Wool Administrator issued a regulation, which the appellant fails to

mention, providing that the Government would not exercise any of its options theretofore reserved on imports from South Africa of wool "Finer than 56's," unless they arrived in the United States *prior to January 1, 1919*. This Court will take judicial notice of that regulation. *Caha* v. *United States*, 152 U. S. 211, 221, 222.

The purpose of that regulation was to terminate the control of imported wools on January 1, 1919, on account of the fact that the Armistice had been signed and the war was at an end. In this connection, Mr. Baruch, in the Report referred to, states, at page 235:

> The close of hostilities naturally left very large stocks of raw wool in the hands of the War Department because there had been necessity for preparing for the future. On December 30th (1918) they amounted to some 313,000,000 pounds.

This surplus was disposed of by auction during 1919.

The Armistice removed the reason which prompted the Government to require importers to grant options before licenses would be issued. In effect, therefore, this order was notice to all importers that the Government released them from their obligations created by the options, and that they could resume, with freedom of Government control, their commercial tradings in this commodity to the same extent as before the war. The

control by the United States ended on January 1, 1919.

The letter of the Assistant Wool Administrator to the claimant, dated December 23, 1918, and made Exhibit H to the amended petition, was written eleven days after the issuance of the regulation just referred to. Hence, the regulation is a part of the letter even though not expressly incorporated therein. When read together, they plainly show that the Government did not thereby intend to exercise any future option to purchase wool. The letter makes no reference to the options. Certainly none can be implied in view of the provisions of the regulation of December 12, 1918. The letter constituted nothing more than an expression of an intention to purchase the wool, provided it was imported in the United States on or before December 31, 1918, in accordance with the regulation of December 12, 1918.

That this contention is not an afterthought but is a real and substantial defense to this action, which has been long asserted by the Government, is shown by the report of the claim of *L. Richardson & Co., Inc.*, Case No. 1844, Vol. 4, Decisions of the War Department, Board of Contract Adjustment, page 1310. The report of that case shows that prior to the institution of the present action in the Court of Claims the claimant prosecuted the same claim for substantially the same amount of wool under the Dent Act of March 2, 1919, Chap. 94, 40 Stat. 1272, before the Board of Contract Adjustment, War

Department. After a trial at which oral and documentary evidence was submitted, the Board rendered a decision denying relief to the claimant and affirmed the construction herein placed upon the rules and regulations under consideration and the acts of the Government officers made in pursuance thereof. From that case it appears that the wool did not arrive at the customhouse from South Africa until some time in March or April of 1919, at a time when the Government had ceased to control the commodity, had canceled its options thereon and had given notice that it would not purchase any wool of the grade "Finer than 56's" imported after December 31, 1918. The Government accepted and paid for all the wool referred to in the letter of December 23, 1918, that was imported prior to December 31, 1918, but refused to accept any imported thereafter.

Moreover, the construction contended for by the claimant that the letter constitutes an exercise of the option and an agreement to purchase the wool even though it was not imported until after December 31, 1918, places the Assistant Wool Administrator in a position of acting in disregard of the express terms of the regulation of December 12, 1918, and precludes any recovery for the reason that the officer in that case would be acting clearly without the scope of his authority. *Whiteside* v. *United States,* 93 U. S. 247.

Furthermore, under the circumstances of this case, the claimant is bound by the provisions of Sec-

tion 3744 of the Revised Statutes, which requires contracts made by the Secretary of War to be in writing and signed by the parties at the end thereof. *Clark* v. *United States,* 95 U. S. 539; *South Boston Iron Co.* v. *United States,* 118 U. S. 37; *Monroe* v. *United States,* 184 U. S. 524; *St. Louis Hay and Grain Co.* v. *United States,* 191 U. S. 159. In *Clark* v. *United States,* 95 U. S. 539, this court, referring to this provision of law, said, at page 531:

> The Court of Claims has heretofore held the Act to be mandatory, and as requiring all contracts made with the departments named to be in conformity with it. The arguments by which this view has been enforced by that court are of great weight and, in our judgment, conclusive.

The Court of Claims has consistently followed this principle. *McLaughlin & Co.* v. *United States,* 36 C. C. 138; *Gillespie's case,* 47 C. C. 310; *American Dredging Co.* v. *United States,* 49 C. C. 350; *St. Louis Hay and Grain Co.* v. *United States,* 37 C. C. 281. Of course, as pointed out by Mr. Justice Holmes in the opinion in the *St. Louis Hay and Grain Company's case,* 191 U. S., 159, the invalidity of the contract is immaterial if it has been performed. But, in the present case the claim is based upon an unperformed agreement, alleged to have been made by a subordinate officer of the Government. The claimant's position is extremely technical. It has already been passed upon by one department of the Government when presented

upon an entirely different theory and under a statute specifically intended to give relief in such cases. Inasmuch as the claimant thereafter neglected to proceed in the Court of Claims under the Dent Act, the Government is entitled to invoke the protection of Section 3744 of the Revised Statutes.

A further claim is made that the Government, in issuing a regulation forbidding the sale of commodities, except with its consent and requiring an option as a condition for an import license, in the manner outlined above, constitutes a taking of the claimant's property with an implied agreement to pay for the same. This contention is also without merit. *Morrisdale Coal Company* v. *United States,* 259 U. S., 188; *Pinehill Coal Company* v. *United States,* 259 U. S., 191.

CONCLUSION

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

DECEMBER, 1924.

○

ADDENDA

L. RICHARDSON & CO. INC. *v.* THE UNITED STATES

No. 142. OCTOBER TERM, 1924

WOOL ADMINISTRATOR'S BULLETIN NO. 132 CANCELLING IMPORT LICENSE OPTION ON WOOL

The following instructions have been received from the Director of Purchase & Storage, Washington, D. C.

"On July 24th, 1918, we instructed you to discontinue the exercise of the Import License Option on Wools imported from Argentina, Uruguay, and South Africa; and on Nov. 21st, 1918, we instructed you to discontinue the exercise of the Import License Option on so-called Carpet or so-called Class Three wools.

We hereby instruct you to immediately give notice that the Government will not hereafter exercise the Import License Option on any other wools, except such wools of the 1917–1918 Foreign Clip grading 44s to 56s as were not covered by the notice of July 24th, 1918, and which were bought prior to the date of this notice, and then only provided a record of such purchase was filed with the Wool Administrator in accordance with the terms of the notice of April 2nd, 1918."

Accordingly, the Government hereby gives notice that, effective Friday, Dec. 13th, 1918, it will no longer exercise the Import License Option on any Foreign Wool, with the exceptions noted above.

However in no event will the Government exercise its Option on wools grading 44s to 56s, covered by this notice unless such wools have been imported and presented for valuation prior to Feb. 1st, 1919.

Neither will the Government exercise its Option on wools from Argentina, Uruguay or South Africa which come under the notice of July 24th, 1918, unless such wools have been imported and presented for valuation prior to Jan. 1st, 1919.

CHARLES J. NICHOLS,
Government Wool Administrator.

DEC. 12, 1918.

DEPARTMENT OF AGRICULTURE
WASHINGTON

Pursuant to Section 882 of the Revised Statutes of the United States, I HEREBY CERTIFY that the following and annexed one sheet of typewritten matter constitutes and is a true, full, correct and compared copy of a record on file in the Department of Agriculture of the United States of America, the same being Wool Administrator's Bulletin No. 132, the original of which was transferred from the War Industries Board to the Bureau of Markets of the Department of Agriculture pursuant to Executive Order of December 31, 1918, dissolving the War Industries Board and directing that on and after January 1, 1919, the powers and functions of the Wool Division of the War Industries Board, including particularly those relating to the payment by dealers or buyers of any sums due by them in accordance with the Government regulations for handling wool clip of 1918, be exercised by the Bureau of Markets of the Department of Agriculture until such time as the work so transferred is finally completed and wound up.

Witness my hand and the seal of the United States Department of Agriculture this sixth day of December, 1924. C. F. MARVIN,

[SEAL] *Acting Secretary of Agriculture.*

○